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BUSINESS AND HUMAN RIGHTS SYMPOSIUM

Which Business?

Controversies about the Scope of Application of a Future Treaty on Business and Human Rights

JANNE MENDE — 30 July, 2018



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The *United Nations treaty process*, the current endeavor in the open-ended working group to draft a legally binding instrument to “regulate, in international human rights law, the activities of transnational corporations and other business enterprises”, causes much trouble and controversy. It is seen as a necessary step long overdue by its proponents, or as a visionary threat to the current consent based on the non-binding UN Guiding Principles in the eyes of its opponents.

The treaty process causes not only political, but also conceptual and legal questions that cannot be reconciled easily or one-dimensionally. One of the highly demanding questions relates to the scope of

application: *Which business companies can or should be addressed by a future treaty on human rights – and which can or should not?*

Conceptually, the current discussion focuses on the transnational dimension of companies. The Human Rights Council Resolution 26/9 (July 2014) that initiated the open-ended working group refers to “transnational corporations and other business enterprises” which “denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.” The intermediary Elements Document issued by the working group (September 2017) confirms the role of a company’s “transnational character, regardless of the mode of creation, control, ownership, size or structure” as the objective scope of the treaty. However, it adds the dimension of a subjective scope that focuses on a company’s transnational activities instead of its character. The Zero Draft (July 2018), the recently published very first version of the future treaty, re-emphasizes the focus on companies’ transnational activities that “take place or involve actions, persons or impact in two or more national jurisdictions.”

From a *legal perspective*, a different treatment of transnational companies on the one hand and domestic companies on the other causes problems in terms of non-discrimination and equality of treatment: principles that are enshrined in international law and in most domestic jurisdictions. At the same time, a legal focus on transnational activities could address the specific challenges that are peculiar to transnational companies. This would provide concrete solutions for concrete problems, other than the “broad and vague norms that would address ‘all business enterprises.’”

The heated debate in and alongside the open-ended working group demonstrates the *political dimension* of the question. The European Union, for example, constantly raises its objection against the limitation of the scope to transnational companies, demanding to address companies operating within one domestic jurisdiction, too. While critics consider this a strategic remark in order to strengthen the EU’s general objection to the treaty, it reflects the fear of several states that other states would use the treaty to target foreign companies but turn a blind eye to their domestic businesses. Civil society organizations share a similar concern, pointing out that human rights violations by domestic companies may be just as gross as those by transnational companies. Then again, it is especially transnational companies that have the possibilities and resources to benefit from

different levels and gaps of the implementation and enforcement of human rights in different jurisdictions.

These controversies can be complemented with a *political science perspective*. It proceeds from the question of transnationality and extends it by two additional criteria. The first criterion refers to the agency and power of companies; and the second takes the private and public roles of companies into account.

It is transnational companies whose *agency and power* beyond the reach of domestic jurisdiction motivated the demand for a binding instrument in the first place. Their power, their global agency, their strong positions in global trade and investment agreements, their resources, annual turnovers and assets considerably exceeding that of certain states attract much attention in the discussion about business responsibilities for human rights. But a large amount of business activities takes place in small and medium-sized enterprises (fewer than 250 employees, annual turnover not exceeding EUR 50 million) or in companies that operate within one jurisdiction. Small and medium-sized enterprises represent 99 % of all businesses in the European Union. What is more, much of their activities are inextricably linked with transnational companies in supply chains and global production systems.

Against this background, taking a company's power and agency into consideration for the scope of business responsibility can contribute to the debate in several regards. First, it addresses the extent of the impact (both positive and negative) of business behavior on human rights. This would mean that a company's capability to violate human rights or to productively contribute to human rights plays a role for their accountability. Second, addressing power enables to take power inequalities into account, e.g. in the relations between suppliers, subcontractors and purchasing companies.

Besides their power and agency, the impact and effects of business behavior on human rights can be captured by scrutinizing their *public and private roles*. Contrary to the standard view established in the 18th, 19th and 20th century that business companies are upfront private actors, acting in a purely private and thereby apolitical sphere of economy, the relation between economy and politics, or between private and public, is intermediated and co-dependent in the first place.

Even from such an intermediated perspective, business companies

ease out of their private roles, assuming functions that are directly related to politics, the common good and public interests. At the same time, they do not simply resemble public or state actors, but preserve private functions and private interests. Business companies are neither private nor public: they are both at the same time, and they transcend that very distinction.

This hybrid role of companies is historically not new. Landowners have provided social welfare, education and health measures up until the 18th century; private merchants have autonomously established trade and merchant customs during the medieval phase; and chartered companies have even fought wars during colonialism.

What is new, though, is its impact on the future development of international human rights. While the hybrid role of companies challenges the state-centered character of the human rights system, it provides new chances to develop hybrid forms of business responsibility for human rights.

In conclusion, when discussing the scope of application of a binding instrument, power, agency and the hybrid roles of companies are able to complement the criterion of transnationality. As with every criterion, there is room for misconduct, e.g. when the criterion of agency turns out to sanction (possibly productive) capabilities, or when the criterion of hybrid roles leads to companies' withdrawal from welfare measures in order to escape accountability. This is why the scope of application must rest on multiple criteria. And it must be discussed from multiple perspectives, including those from international law and political science.

PD Dr. Janne Mende is conducting her DFG-funded research project about "Business Actors beyond Public and Private: Authority, Legitimacy and Responsibility in the United Nations Human Rights Regime" at the University of Giessen.

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